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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 38

RAYMOND C. ARMSTRONG,

Petitioner,

v.

MARY R. ARMSTRONG,
GENERAL MOTORS CORPORATION, et al.,

Respondents.

REPLY BRIEF FOR PETITIONER, RAYMOND C. ARMSTRONG

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There is only one question involved in this case—whether the Florida decree of October 2, 1951, granting Armstrong a divorce and denying alimony to Mrs. Armstrong, should have been given entire full faith and credit by the Ohio courts. The question is set forth on page 3 of the brief of the respondent; but then respondent presents many extraneous and miscellaneous matters which are not in the case.

The Ohio courts have already held that the decree granting the petitioner a divorce, entered in Florida on October 2, 1951, must be given full faith and credit. The only other question is whether that part of the decree entered in

Florida on October 2, 1951, denying alimony to the respondent, Mrs. Armstrong, should have been given full faith and credit. If it was entered after due process, it follows it must be given full recognition by the Ohio Courts. If it was not entered after due process, then the Ohio Courts in failing to recognize a portion of the decree were correct, and the doctrine of divisible divorce was properly applied. We submit, that even though there was service only by publication, we have shown that the respondent had full opportunity to appear in the courts of the matrimonial domicile and that the property was located there. A decree entered pursuant to such facts was one in compliance with due process requirements, and it was one entitled to full recognition by the Ohio courts.

COMMENTS ON STATEMENTS OF FACTS AND CLAIMS OF RESPONDENT

As the case was presented both to the Court of Appeals of Ohio, and to the Supreme Court of Ohio, the question and issue was:

"After Armstrong, the petitioner, has been granted a decree for divorce in Florida on October 2, 1951, which decree also denied alimony to Mrs. Armstrong, the respondent, was Mrs. Armstrong prevented by the Constitution of the United States from filing a petition in Ohio, on February 1, 1952, and from securing alimony in Ohio; or, were the Ohio courts bound to give entire full faith and credit to the Florida decree? In other words, could Mrs. Armstrong relitigate the issue of alimony in Ohio, after the decree had been granted in Florida, which was the matrimonial domicile; and when the respondent had full knowledge of the Florida proceedings, and complete opportunity to appear?"

Instead of answering this question, the respondent details facts, which were hotly disputed, and had nothing to do with the decision.

Both the Court of Appeals of Ohio and the Supreme Court of Ohio held that Florida was the matrimonial domicile of both parties (Petition for Writ of Certiorari 110a-122a, 162 Ohio St. 406, 123 N. E. [2d] 267). This finding was amply supported by the evidence as both parties owned a home, lived, paid taxes and voted in Florida.

Nor is the issue of fault of the parties before the court. Attempts to set forth a letter written back in 1948, and alleged ill treatment, are not in issue. All of these incidents were disputed by Armstrong both in Florida and in Ohio to show the fault was on her part (R. 130-138, 160, 221-232, 258 et seq., 265 et seq.).

The Court of Appeals of Ohio significantly said that "the Florida decree was supported by sufficient evidence" (Petition for Writ of Certiorari 14a), and the Supreme Court of Ohio likewise proceeded upon the same assumption. Since the Florida decree was based on sufficient evidence, the only question was whether the respondent could still obtain alimony, since she was served only by publication. That is the one and only issue before the court.

Likewise, it is clear that since both parties were residents of Florida, the courts of that state had full jurisdiction to hear and determine the cause. There was no fraud relating to the jurisdiction or the subject matter of the action. Consequently, efforts to complain of a master commissioner's fee or to relitigate the facts as to fault are entirely extraneous. The record contains the proceedings in Florida, and as the Court of Appeals of Ohio said there was sufficient evidence to support the decree for divorce in Dade County, Florida on October 2, 1951.

It, therefore, is totally unnecessary to make any reply to Subdivisions II, III and VI in the argument of respondent's brief as they are apparently inserted for the purpose of confusing the issue.

An effort is likewise made to attempt to show that trial counsel in this cause agreed with the petitioner by taking a sentence out of context (Brief of Respondent, p. 17). This was not a waiver, and was made only after the trial court had held that an alimony action would survive the Florida decree by saying that "Even if the court finds they are divorced, she is still entitled to alimony" (R. 129). The trial brief referred to, did not in any way waive the issues raised by the pleadings, that full faith and credit should be given to the entire decree in Dade County, Florida.

The answer herein filed on January 2, 1953 clearly and unequivocally states in the third paragraph that the Florida court "had full and complete jurisdiction over the subject matter of said action and over the persons of this defendant and plaintiff" (R. 7). At the end of his answer, petitioner specifically pleaded that, because of the foregoing allegations, including that as to the Florida decree," plaintiff is not entitled to a divorce or *alimony* from defendant, and. . . ." (R. 11, emphasis added.) The issue of whether the Florida decree was full, complete and final preventing further litigation of the question of alimony, was raised by the pleadings, and was the only issue considered by the reviewing courts.

While the trial memorandum referred to by respondent on 17 is not before the court, it cannot be denied that the effect of *Thompson* v. *Thompson*, 226 U. S. 551 was fully and completely argued before the court on a motion for a new trial. The question of whether the decree in Dade County, Florida should be given full faith and credit has never been withdrawn or waived, and has been argued as the principal matter in all three of the lower courts.

THE OHIO COURT ERRED IN GRANTING ALIMONY

A. Full Faith and Credit.

Despite the strained argument of respondent along other lines, the question resolves itself into one question: was the Ohio court correct in denying full faith and credit to that part of the decree denying alimony in Dade County, Florida because it was an action *in personam* and the defendant was only constructively served?

It must be conceded that if the Florida decree litigated the matter of divorce, and effectively litigated the question of alimony by its decree on October 2, 1951, the respondent could not four months later relitigate the matter of alimony in Ohio.

Respondent seems to rely heavily upon *Williams* v. *North Carolina*, 325 U. S. 231; *Estin* v. *Estin*, 334 U. S. 541; *Pawley* v. *Pawley*, 46 So. (2nd) 464 (Fla.); and *Hopson* v. *Hopson*, 221 Fed. (2nd) 839 (C. A. D. C.). In all four cases there is a distinction in the facts. In each of those cases *the husband* left the matrimonial domicile, established a residence in another jurisdiction, and filed the divorce action there. In all four cases the validity of the divorce was upheld by the court, but the court held an action for alimony or a previous order of alimony survived. This gave rise to the theory of "divisible divorce."

Here, the husband remained in the matrimonial domicile. While the wife was only served by publication, she had full knowledge and notice of the proceedings, and deliberately refused to challenge them even though they were in the jurisdiction where she spent her married life. It can be seen that there is no similarity between the two sets of facts. We know of no decision where a court has failed to grant entire full faith and credit to a decree denying alimony in the matrimonial domicile where full opportunity to appear was afforded. *Thompson* v. *Thompson*, 226 U. S.

251 has been distinguished, but it has never been and should not be overruled.

Respondent places reliance on *May* v. *Anderson*, 345 U. S. 528, but a case involving custody of children is by its very nature ambulatory. As was so well pointed out by Justice Frankfurter, "property, personal claims and even the marriage status generally give rise to interests different from those relevant to the discharge of a State's responsibility to children within her borders" (345 U. S. 528, 536). The child is the one primarily involved, and a rule of res adjudicata or full faith and credit can hardly be applied against a child not *sui juris*. The interest of the parent is secondary.

Distinctions between *in personam* and *in rem* actions are largely artificial, and are not controlling. *Mullane* v. *Hanover Bank & Trust Co.*, 339 U. S. 306, 314; *Milliken* v. *Meyer*, 311 U. S. 457. If opportunity to appear is afforded in the matrimonial domicile to the absent spouse that should be sufficient. As said in *Scherrer* v. *Scherrer*, 334 U. S. 343, 350:

> "Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res adjudicata* applies to adjudications relating either to the jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings on which those questions were in issue, and in which *the parties were given full opportunity to litigate*." (Emphasis supplied.)

In this case, Mrs. Armstrong knew of the litigation, and deliberately with full knowledge declined to appear in Florida (R. 303), despite the public policy rule in Florida which awards attorneys fees and expenses to a wife, even if she be denied alimony. *Stern* v. *Stern*, 50 So. (2nd) 149 (Fla.). The case was then heard in Florida. The Court of Appeals in Ohio held specifically:

> "At the trial of these issues, evidence was introduced from which the conclusion could be reasonably deduced that the plaintiff (Mrs. Armstrong) in this action had been guilty of gross neglect of duty and extreme cruelty, and that the Florida decree, granting a divorce to the defendant herein, was supported by sufficient evidence" (Petition for Writ of Certiorari 14a).

In other words the Ohio court found that the Florida court had before it sufficient evidence to award Armstrong a decree for divorce for gross neglect and extreme cruelty. It would follow as a matter of course, that there was sufficient evidence to deny Mrs. Armstrong alimony. When that decree was entered on October 2, 1951 (R. 246), the entire marital rights of the parties had been adjudicated. Ohio could not re-open the case on Mrs. Armstrong's petition filed February 1, 1952, four months later. If she could have re-opened the case in Ohio four months later what would prevent her from re-opening the case fifteen years later, say in Oregon or Maine? The public policy that litigation must end sometime, would dictate otherwise.

We know that had the wife personally appeared in Florida she would have been bound, *Davis v. Davis*, 305 U. S. 32; *Scherrer* v. *Scherrer*, 334 U. S. 343. However, we maintain that where the action was instituted in the matrimonial domicile, and the absent spouse, although served by publication, had knowledge of the action and was afforded full opportunity to appear, the same rule should apply. This court has never held to the contrary, and in *Thompson* v. *Thompson* specifically held it would apply. As we shall show had respondent gone to Florida, the court could have allowed her expenses and attorneys' fees.

The cause of action arose in Florida, the matrimonial domicile, where the law as to alimony may have been different from that of Ohio. The Ohio courts could well have

said to Mrs. Armstrong that, since she fled from her matrimonial domicile, Florida and not Ohio should determine her right to alimony. Not to render to Florida, the state where there was a dominant interest, that right was to disregard its judgments and orders, and to attempt to review by independent action what the Florida courts had determined.

The Ohio courts were bound to give full faith and credit to the Florida order under the circumstances just as Florida does to decrees in Ohio. Cf. *Riehl* v. *Riehl* (Fla.) 60 So. (2nd) 35. The Ohio courts should have said in effect that since the matrimonial domicile was in Florida, and since the respondent had full knowledge of the proceedings, Florida was the state where all matters could be settled. It having done so in a manner that amply afforded due process, the Ohio courts are powerless to relitigate the matter, but must give full faith and credit to the entire decree entered in Dade County, Florida on October 2, 1951.

B. The Property in Florida.

Respondent insists that the Ohio courts had jurisdiction to divide the General Motors stock. The stock was always in the name of Raymond C. Armstrong (R. 5, 120). Under the law in Florida the court has said that "we hold to the rule that intangible personal property in contemplation of law accompanies the owner." *Beverly Beach Properties* v. *Nelson*, 68 So. (2d) 604, 611 following *Nelson* v. *Miller*, 201 F. (2d) 277 (C. A. 9).

Despite the fact that the respondent, Mrs. Armstrong, purloined the certificates unendorsed, since Armstrong continued to live in Florida, the situs of the stock was still in that state. Such fact gave the Florida court jurisdiction to deal fully with the General Motors stock, and her wrongfully taking the certificates unendorsed to Ohio, did not oust the Dade County, Florida court of jurisdiction. It would

be strange to hold that a wife, by wrongfully converting property of the husband, and fleeing, could deprive the matrimonial domicile of jurisdiction, and she could, at a later date, shop for a forum, and vest that distant forum with jurisdiction to determine rights in the converted property.

Upon hearing the evidence the Dade County Circuit Court held:

> "In Florida a wife may be guilty of conversion or even embezzlement of her husband's property as held by the Supreme Court of Florida in *State* v. *Herndon*, 27 So. 2d, 833, 158 Fla., 115. The court, therefore, finds that the stock certificates and bonds registered in the name of the plaintiff, the possession of which has been taken by the defendant against the consent of the plaintiff, *are the property of the plaintiff*, and the defendant is hereby directed and specifically ordered to return the said stock certificates and bonds to the plaintiff within fifteen (15) days from the date of the entry of this decree or be subject to an order for contempt and such other relief that may be deemed proper by this court" (R.248). (Emphasis supplied.)

And again the court in its order stated:

> "It is, therefore, specially decreed that *no award of alimony* be made to the defendant and that the legal and equitable title to the real property above described was vested in the plaintiff as of the date of the purchase of the same by the plaintiff and the said legal title to said property be and the same is hereby vested in fee simple absolute in the plaintiff, Raymond C. Armstrong, also known as Ray Armstrong, without further deed or conveyance from the defendant" (R. 249). (Emphasis supplied.)

This clearly showed that the Florida court not only recognized ownership of the stock in the petitioner, Armstrong,

but knowing those facts denied any alimony to the respondent.

The Ohio courts were bound to recognize the right of Florida courts to determine ownership of the stock, and the right to deny any alimony out of the stock to the respondent. However, the Ohio court made the entire award of alimony in General Motors Stock (R. 19). The award to respondent was 1,250 shares of General Motors stock, which after the shares have been recently split is worth today approximately $170,000.00.

Respondent seems to argue that the parties and the stock certificates being in Ohio, courts of that state had jurisdiction and control over the stock. That might be true had Florida not previously litigated the same matter. If the Florida court could have awarded Mrs. Armstrong alimony out of the stock even in Armstrong's absence, it seems axiomatic it had jurisdiction to deny any alimony out of the stock. Cf. *Pennington* v. *Fourth National Bank*, 243 U. S. 269.

THE FLORIDA COURT HAD JURISDICTION TO DENY ALIMONY

The rather astounding argument is made that under the Florida statutes (Chapter 65, Sections 65.07) an action for alimony can only be invoked by the wife, and therefore, the court could not deny alimony to the wife on the petition of the husband.

This is not the law of Florida, but was conjured up in desperation in the mind of counsel for the respondent. In the case of *Stern* v. *Stern*, 50 So. (2nd) 119 (Fla.) the wife filed suit, and on the cross petition the husband was granted a decree, and the *wife denied any alimony*. On appeal the upper court assessed as costs the wife's attorneys fees, but affirmed the order denying the wife alimony.

The claim that the chancellor in Florida was compelled to grant alimony to a wife is without the slightest foundation. An award or denial of alimony in Florida as in nearly every state rests within the sound discretion of the court as shown by the case of *Stern* v. *Stern*, supra. However, the wife could be assured of her expenses in the litigation had she returned to Florida to contest the action and to claim alimony.

We have heretofore shown that distinctions between *in personam* actions and those *in rem* are largely artificial. In fact divorce and alimony actions are often placed in a middle category as *quasi in rem*.

Viewed from that situation it is clear that the Florida court had the right to deny the wife alimony. If the wife had sued in Florida, the wife could have obtained alimony out of the property that was in the jurisdiction. By the same reasoning the Florida court could properly deny alimony to a wife out of property in the jurisdiction. In either event the matter would be res adjudicata and final and other states would have to give the finding full faith and credit.

The real question in the cause is whether the denial of alimony by the Dade County Circuit Court of Florida was entered after due process. The matrimonial domicile of the parties was in Florida, and Mrs. Armstrong had full knowledge of the proceedings. She deliberately refused to appear in the Florida courts, but sought to re-establish a domicile in Ohio. Before the domocile was established, the court in Florida acted on October 2, 1951, and she took no appeal from the decree entered on that day.

Her attack on the Florida decree in Ohio was, therefore, a collateral one. Since she had had more than "minimum contacts" with Florida, and notice and opportunity to appear had been afforded, the procedure in Florida conformed with "traditional notions of fair play and substantial jus-

tice" and was in accord with due process. The Florida court clearly had jurisdiction to deny alimony, and constitutionally that decree became immune from collateral attack in a sister state.

CONCLUSION

While the respondent has attempted to inject extraneous issues into the cause, the sole question is whether or not the denial of alimony to the respondent by the Dade County Circuit Court of Florida on October 2, 1951 was entered after due process. We have shown that not only was Florida the matrimonial domicile of the parties, but the state where their property was legally located. While only served by publication, the respondent had full opportunity to appear and deliberately refused to do so. Florida had a dominant interest in the marital relationship, and the right to completely settle all difficulties.

After that decree was entered, the respondent, had no right to choose another forum to relitigate the issues. The Ohio court in permitting her to do so, recognized that full faith and credit must be given to the decree for divorce to petitioner, but denied full faith and credit to the remainder of the decree. Such action violated the provisions of Article IV of the United States Constitution.

If the decree in Florida is not recognized in its entirety mere flight by a spouse can defeat the only jurisdiction where marital affairs can be completely settled. Such a rule would cause chaos, and defeat the right of a husband to fully adjudicate matters, and compel wives to follow fleeing husbands to other states to secure alimony or support. Such a rule would permit the fleeing spouse to select the forum in which alimony problems would have to to be litigated, and then only after the fleeing spouse had established a new domicile. We submit that the doctrine of "divisible divorce" was never intended to establish such a situation.

It was intended to apply only where the wife did not have full opportunity to appear and defend, in an action instituted outside the state of the matrimonial domicile. Likewise, the doctrine of "divisible divorce" was not intended to apply where the question of alimony has already been adjudicated, especially where alimony has been adjudicated in a state where there were dominant interests. Otherwise, what might not be grounds for alimony in Florida might entitle the wife to alimony in Ohio. "Forum shopping" otherwise would become decisive in alimony actions.

Respectfully submitted,

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